

**Office of Chief Counsel
Internal Revenue Service**

memorandum

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date: OCT 25 2001

to: Manager, PSP Compliance Support
Area 10 MS 40300KC

from: Associate Area Counsel (SB/SE)

subject: Indian Claims Issues

This memorandum responds to your request for assistance dated June 8, 2001. This memorandum should not be cited as precedent.

ISSUES

1. Whether the heirs of a deceased Indian ward can file a claim for refund of erroneous tax paid on exempt income.
2. Whether a general power of attorney that does not comply with the requirements of Treas. Reg. § 601.503 is valid for purposes of I.R.C. §§ 6402 and 6103.
3. Whether a claim for refund of income tax is sufficient if filed on Form 843.

CONCLUSION

The heirs of a deceased Indian ward can file a claim for refund of income taxes. A general power of attorney that does not comply with Treas. Reg. § 601.503 is not valid for purposes of I.R.C. §§ 6103 and 6402. The Service may waive the formal requirements contained in Treas. Reg. § 301.6402-2(b), thereby permitting a claim for credit or refund to be filed on Form 843, rather than on Form 1040X.

FACTS

The Service has received two claims for refund of income taxes paid by deceased Indians. In one case, there is no evidence of a probate proceeding having been instituted. In the other case, a probate case was instituted, heirs were determined, distribution was made and the case was closed in [REDACTED].

The claims were filed on Forms 843 and are for the taxable years [REDACTED] and [REDACTED].¹ They seek refund of income tax paid on lease bonus and cash rentals received with respect to leases of restricted Indian land. Both claims rely on U.S. v. Daney, 370 F.2d 791 (10th Cir. 1966) and Clark v. U.S., 587 F.2d 465 (10th Cir. 1978), which held that such income was exempt from taxation. The claims were filed by an individual who was granted a power of attorney by the heirs of the deceased Indians. This individual is not a family member of the deceased Indian, or an attorney, certified public accountant or enrolled agent. The Power of Attorney attached to the claims provides in pertinent part as follows:

That we, the undersigned, the sole and only heirs of ..., deceased, a member of the federally recognized ... Indian Tribe, Roll # ..., hereinafter referred to as ... heirs, do hereby make, constitute and appoint [XXX], ... as attorney-in-fact to act for us in our names, place and stead, and to our use, to ask, demand, collect, sue for, receive and prosecute both in court and out of court all claims to recover taxes, penalties and interest illegally collected from tax-exempt lands. [XXX], our attorney-in-fact, shall have authority to do all acts to accomplish the collection of any and all refunds for all the calendar years from the beginning of Income Tax to the present. [XXX] shall have the authority and power to receive confidential information from the Oklahoma

¹ The statute of limitations is not an issue in cases where a claim for refund is filed for taxes that were paid by an Indian superintendent on tax-exempt income directly derived from allotted and restricted Indian lands. Rev. Rul. 61-11, 1961-1 C.B. 724. The claim for [REDACTED] clearly involves a return filed by an Indian superintendent and tax-exempt income derived from restricted Indian land. This also appears to be the case for the [REDACTED] claim, although additional information will be needed to corroborate this.

Tax Commission, the Internal Revenue Service, the Department of the Interior, Bureau of Indian Affairs, and the Federal Records Centers or any other necessary source, and to receive[,] endorse and collect checks in payment of any refund, and execute any and all forms and elections, but not limited to the aforementioned authority and power. [XXX], our true and lawful attorney-in-fact, is authorized and has full power to research, investigate and to do any and all acts to accomplish the collection of the said refunds. All communications involving this matter shall be sent to [XXX]... .

Each Indian heir also entered into an agreement with the power of attorney, whereby they agreed to permit the power of attorney "to do all acts to accomplish the collection of any and all refunds of taxes, penalties and interest that may have been illegally collected from tax-exempt lands." In return for her services, the power of attorney is to receive [REDACTED] percent of any amount collected.

DISCUSSION

This advisory opinion deals with deceased Indian wards, their heirs and income from restricted Indian land. Native American Indians have consistently received different tax treatment than other American citizens, especially when restricted Indian lands are involved. Ambiguities should be resolved in the Indian's favor. Choate v. Trapp, 224 U.S. 665, 675 (1912); Clark v. United States, 587 F.2d 465, 467 (10th cir. 1978).

I.R.C. § 6402(a) provides that the Secretary, within the applicable period of limitations, may credit or refund any overpayment of tax. Credits or refunds of overpayments may not be allowed or made unless a claim for refund has been filed by the taxpayer prior to the expiration of the statute of limitations. Treas. Reg. § 301.6402-2(a). The claim must state the grounds and facts sufficient to apprise the Service of the exact basis thereof. Treas. Reg. § 301.6402-2(b). A separate claim should be filed for each type of tax for each taxable year. Treas. Reg. § 301.6402-2(d). In the case of an overpayment of income taxes, a claim for credit or refund shall be made on a Form 1040X. Treas. Reg. §§ 301.6402-2(c) and 301.6402-3(a)(5).

Claims for refund filed on behalf of a decedent must comply with the requirements of Treas. Reg. § 301.6402-2(e), by providing proof of the representative capacity of the person making the claim for refund. A claim may be executed by an agent of the taxpayer, but in such case, a power of attorney must accompany the claim.

The first issue to be addressed is whether the heirs of a deceased Indian have the right to file a claim for refund on the decedent's behalf.

Under Oklahoma law, actions for the recovery of any property, real or personal, may be maintained by and against executors and administrators in the same courts in which the same might have been maintained by or against their respective testators and intestates. Okla. Stat. Ann., tit. 58 § 252 (West 1995).

Rev. Rul. 73-366, 1973-2 C.B. 408 provides that a claim for refund or credit of income tax by an estate discovered after the estate has been finally terminated may be made by either a single claim filed by all beneficiaries or by individual claims filed by each beneficiary in proportion to the tax paid by his or her share. See also Pettengill v. United States, 253 F.Supp. 321, 322 (N.D. Ill. 1966) (sole beneficiary of the estate succeeded by operation of law to whatever refund claims the estate may have originally have had); Campbell Farming Corp. v. United States, 132 F. Supp. 216 (Ct. Cl. 1955) (the final distribution of the assets of the estate constituted an assignment by operation of law and estate lost any interest in the claims for refund).

The Service, in various sections of the IRM and in publications, has recognized the right of heirs to file claims for refund on behalf of deceased taxpayers. Forms 56 and 1310 are used in circumstances where there is a fiduciary relationship or where no executor or administrator is appointed. See IRM 3.13.222.12(2) and Pub. 559.

Based on the foregoing, we believe that the heirs of a deceased Indian have the right to file a claim for refund on behalf of the decedent. Any refund, however, should be made to the Department of Interior, Bureau of Indian Affairs, as successor to the Indian Superintendent. Rev. Rul. 61-11, 1961-1 C.B. 724 provides that any refund of taxes properly due should be made to the Indian Superintendent for the benefit of the Indian ward or his/her successor beneficially entitled to the refund.

The second issue is whether a general power of attorney that does not comply with Treas. Reg. § 601.503 is valid for purposes of I.R.C. §§ 6103 and 6402.

I.R.C. § 6103(e)(6) and (7) permit disclosure of the return and return information to the attorney in fact duly authorized in writing by any of the persons described in paragraphs (1) through (5), (8) and (9). Paragraph (3) deals with deceased individuals. Disclosures under these sections require that the representative have a valid power of attorney.

Treas. Reg. § 301.6402-2(e) provides that claims for refund must be accompanied by proof of the authority of the legal representative to file the claim. A claim may be executed by an agent of the person assessed, but a power of attorney must accompany the claim.

Treas. Reg. §§ 601.501 through 601.509 set forth rules by which a recognized representative is authorized to act on behalf of a taxpayer. Section 601.502(a) provides that a recognized representative is an individual who is (1) appointed as an attorney-in-fact under a power of attorney and (2) a member of one of the categories described in section 601.502(b) and who files a declaration of representative, as described in section 601.502(c). These requirements are not presently met in these cases.

Section 601.503(a)(1) through (6) provides that a power of attorney must contain the following information: the taxpayer's name and mailing address; the taxpayer's SSN or EIN; the representative's name and mailing address; a description of the matter for which representation is authorized, including the type of tax, the tax form number, the specific year(s) involved and the decedent's date of death; and a clear expression of the taxpayer's intention concerning the scope of authority granted to the representative.

Section 601.503(c) requires that a power of attorney be signed. When the power of attorney involves a deceased taxpayer, the executor or administrator should file a Form 56, "Notice Concerning Fiduciary Relationship." If no executor or administrator is acting or responsible, a Form 56 should be filed by the residuary legatees. In the event that the decedent died

intestate and the administrator has been discharged and is not responsible for disposition of the matter, or none was ever appointed, a Form 56 should be filed by the distributees. Section 601.503(d)(3)(i) through (iii).²

The powers of attorney attached to the refund claims are deficient in that the taxpayer's name and mailing address, the tax form number, the tax year and the decedent's date of death are not specified, as required by section 601.503(a). In addition, the heirs have not executed and filed a Form 56 with the Service as required by section 601.503(c).

The Service will not accept a power of attorney which fails to meet the requirements of section 601.503(a). Section 601.503(b)(3). If a power of attorney fails to include some or all of the information required by section 601.503(a)(1) through (6), the attorney-in-fact can cure the defects by executing a Form 2848, on behalf of the taxpayer, which includes the missing information. Attaching a Form 2848 to a copy of the original power of attorney will validate the original power of attorney, provided the following conditions are met: (i) the original power of attorney contemplates authorization to handle federal tax matters (i.e. includes language to the effect that the power of attorney has authority to perform any and all acts) and (ii) the attorney-in-fact attaches a statement that the original power of attorney is valid under local law. Section 601.503(b)(3).

In order to be a recognized representative, the individual must be a member of one of the categories described in section 601.502(b). The categories include attorney, certified public accountant, enrolled agent, enrolled actuary and other individuals.³ Section 601.502(b)(1) through (5).

Lastly, section 601.502(a) requires that the individual file a declaration of representative. Section 601.502(c) provides that a recognized representative must attach to the power of attorney a written declaration stating that the individual is: (1) not under suspension or disbarment; (2) aware of the regulations in Treasury Department Circular No. 230; (3) authorized to represent the taxpayer and (4) is one of the

² The Service can require production of appropriate evidence to show the relationship of the individuals to the decedent and the right of each signer to the respective shares of the assets claimed under the law of the domicile of the decedent.

³ "Other individuals" is defined in subsection 601.502(b)(5)(i) through (iv). These sections are not pertinent to these cases.

individuals described in section 601.502(b). Subsection (c) further provides that if an individual is unable to make such a declaration, he/she may not engage in representation of a taxpayer before the Service or perform the acts described in sections 601.504(a)(2) through (6).

In these cases, the individual who was appointed the power of attorney by the heirs of the deceased Indian is not a member of one of the categories set forth in section 601.502(b)(1) through (5) and no declaration of representative was attached to the power of attorney as required by sections 601.502(a) and (c).

The representational defect cannot be cured by the special provision of Treas. Reg. § 601.502(b)(3). This provision is designed to cure specified informational deficiencies in an original power of attorney, which deficiencies otherwise would prevent the individual from becoming a representative before the Service with respect to a given tax matter. It cannot be used as an opportunity to substitute a new representative or to delegate authority to another representative, which is governed by Treas. Reg. § 601.505(b)(2).

Based on the foregoing, the claims for refund are deficient as they are not accompanied by a valid power of attorney as required by Treas. Reg. § 301.6402-2(e). In addition, disclosure is prohibited by the lack of a valid power of attorney. I.R.C. § 6103(e)(6); Treas. Reg. §§ 301.6103(c)-1(b) and 601.502 et seq.

The third issue is whether a claim for refund of income tax is sufficient if filed on Form 843.

Credits or refunds of overpayments may not be allowed or made unless a claim for refund has been filed prior to the expiration of the statute of limitations. I.R.C. § 6511(a) Treas. Reg. § 301.6402-2(a). The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Service of the exact basis thereof. Section 301.6402-2(b)(1). The statement and the grounds and facts must be verified by a written declaration that it is made under penalty of perjury. A claim which does not comply will not be considered for any purpose as a claim for credit or refund. In the case of a claim filed after June 30, 1976, for credit or refund of income taxes for the taxable year of an individual for which a Form 1040 or 1040X has been filed, a claim for refund shall be made on Form 1040X. Section 301.6402-3(a)(2). Form 843 was the appropriate form for a claim for credit or refund filed prior to July 1, 1976. Sections 301.6402-2(c) and 301.6402-3(b).

The Service has the authority to waive the formal requirements imposed by the regulations. Angelus Milling Co., v. Commissioner, 325 U.S. 293 (1945); Goulding v. United States, 929 F.2d 329 (7th Cir. 1991).

In these cases, the claims were filed on Forms 843. Each claim sets forth the grounds and facts supporting the claim. The claims are signed under penalty of perjury, although the signature is not accompanied by a valid power of attorney.

We believe the Service can, in appropriate circumstances, waive the defect regarding the form the claim is filed on as long as the claim otherwise meets the requirements of section 301.6402-3(a)(2), i.e. the grounds and facts in support are adequately set forth on the claim, or a supplemental claim filed subsequent thereto, and it is verified by a written declaration made under penalty of perjury.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions, please contact Attorney Bruce K. Meneely at extension 4831. We are closing our file on these cases.

/S/ MICHAEL J. O'BRIEN

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